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**2003 Wis Eth Bd 13**  
**LOCAL CODE**

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The person or persons on whose behalf a town attorney sought the Ethics Board's advice are entitled to keep the Board's opinion confidential. Whether the attorney directed the letter to the Ethics Board on half of the Town, or on behalf of the Town's chair, is a question of fact the Board cannot resolve.

Facts

¶1 This opinion is based upon these understandings:

- a. You represent a town.
- b. At a closed meeting, the Town Board discussed the possibility of a substantial conflict between the Town Chair's duties to his private employer and his responsibilities to the town.
- c. As a result of the meeting, the town board members agreed that you should seek the Ethics Board's advice on the matter.
- d. The Town Chair, pursuant to §19.59, *Wisconsin Statutes*, directed a letter to you asking you to advise him about a potential conflict.
- e. By letter, you requested the Ethics Board's advice about the interpretation of §19.59, *Wisconsin Statutes*.
- f. The Ethics Board issued its opinion to you.
- g. Members of the town board have asked you to permit them to see the Ethics Board's opinion. The Town Chair has indicated that he does not want you to provide a copy to them.

Questions

¶2 The Ethics Board understands your question to be:

Consistent with §19.59, *Wisconsin Statutes*, may you provide a copy of the Ethics Board's opinion to members of the Town Board?

## Discussion

¶3 Your letter raises questions about the degree of confidentiality that attaches to:

- (a) An advisory opinion issued by a town attorney pursuant to §19.59 (5), *Wisconsin Statutes*, and
- (b) An advisory opinion issued by the Ethics Board pursuant to §§19.46 (2) and 19.59 (6), *Wisconsin Statutes*.

### **Opinion issued by town attorney**

¶4 Anyone may seek a town attorney's opinion "regarding the propriety of any matter to which the person is or may become a party."<sup>1</sup> A person may seek advice on the individual's own behalf, or as an agent of a government, or as the agent of any organization. The attorney's obligation is to review the request. The attorney may respond, but is not obligated to do so. Most often, the decision to reply or not will be entirely discretionary, but on occasion there may be constraints (e.g., the scope of the attorney's employment by the town or the attorney's representation of another interested party) that will not allow the attorney to respond.

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<sup>1</sup> Section 19.59 (5) (a), *Wisconsin Statutes*, provides:

**19.59 (5)** (a) Any individual, either personally or on behalf of an organization or governmental body, may request of a county or municipal ethics board, or, in the absence of a county or municipal ethics board, a county corporation counsel or attorney for a local governmental unit, an advisory opinion regarding the propriety of any matter to which the person is or may become a party. Any appointing officer, with the consent of a prospective appointee, may request of a county or municipal ethics board, or, in the absence of a county or municipal ethics board, a county corporation counsel or attorney for a local governmental unit an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party. The county or municipal ethics board or the county corporation counsel or attorney shall review a request for an advisory opinion and may advise the person making the request. Advisory opinions and requests therefor shall be in writing. It is prima facie evidence of intent to comply with this section or any ordinance enacted under this section when a person refers a matter to a county or municipal ethics board or a county corporation counsel or attorney for a local government unit and abides by the advisory opinion, if the material facts are as stated in the opinion request. A county or municipal ethics board may authorize a county corporation counsel or attorney to act in its stead in instances where delay is of substantial inconvenience or detriment to the requesting party. Except as provided in par. (b), neither a county corporation counsel or attorney for a local governmental unit nor a member or agent of a county or municipal ethics board may make public the identity of an individual requesting an advisory opinion or of individuals or organizations mentioned in the opinion.

¶5 In any event, whenever the attorney does reply to a request for advice posed under §19.59 (5), *Wisconsin Statutes*, the person who made the request for advice is free to guard the confidentiality of the advice or to distribute copies far and wide or to pursue an intermediate course. For his or her part, the attorney is obliged to guard the confidentiality of the person who requested the advice unless that person waives the confidentiality. The person may waive that confidentiality either by a statement to that effect or by making or purporting to make public the substance or any portion of the advice.<sup>2</sup>

### Opinion issued by the State of Wisconsin Ethics Board

¶6 A town attorney may request the Ethics Board's opinion concerning the interpretation of §19.59.<sup>3</sup> A town attorney may seek an opinion even absent a specific request or directive from the town or any other person, as long as the attorney is acting within the scope of his or her employment. The Ethics Board's obligation is to review the request; the Board may respond but is not obligated to do so.<sup>4</sup>

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<sup>2</sup> Section 19.59 (5) (b), *Wisconsin Statutes*, provides:

**19.59 (5) (b)** A county or municipal ethics board, county corporation counsel or attorney for a local governmental unit replying to a request for an advisory opinion may make the opinion public with the consent of the individual requesting the advisory opinion or the organization or governmental body on whose behalf it is requested and may make public a summary of an advisory opinion issued under this subsection after making sufficient alterations in the summary to prevent disclosing the identities of individuals involved in the opinion. A person who makes or purports to make public the substance of or any portion of an advisory opinion requested by or on behalf of the person waives the confidentiality of the request for an advisory opinion and of any records obtained or prepared by the county or municipal ethics board, the county corporation counsel or the attorney for the local governmental unit in connection with the request for an advisory opinion.

<sup>3</sup> Section 19.59 (6), *Wisconsin Statutes*, provides:

**19.59 (6)** Any county corporation counsel, attorney for a local governmental unit or statewide association of local governmental units may request the board to issue an opinion concerning the interpretation of this section. The board shall review such a request and may advise the person making the request.

<sup>4</sup> Section 19.46 (2), *Wisconsin Statutes*, provides:

**19.46 (2)** Any individual, either personally or on behalf of an organization or governmental body, may request of the board an advisory opinion regarding the propriety of any matter to which the person is or may become a party; and any appointing officer, with the consent of a prospective appointee, may request of the board an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party. The board shall review a request for an advisory opinion and may advise the person making the request. Advisory opinions and requests therefor shall be in writing. The board's deliberations and

¶7 In any event, whenever the Ethics Board does reply to a request for advice posed under §§19.46 (2) or 19.59 (5), *Wisconsin Statutes*, the person on whose behalf the request for advice was made is free to guard the confidentiality of the advice or to distribute copies far and wide or to pursue an intermediate course. For its part, the Board is obliged to guard the confidentiality of the attorney and the person on whose behalf the attorney has sought the Ethics Board's opinion unless that person waives the confidentiality. The person may waive that confidentiality either by a statement to that effect or by making or purporting to make public the substance or any portion of the advice.<sup>5</sup>

### **Determination of client is question of fact**

¶8 On whose behalf a local attorney has requested the Ethics Board's advice is a question of fact. A local government attorney is the legal representative of the governmental unit that employs him or her and generally not the legal representative of a specific individual. Most often, a town attorney acts on behalf of the town in seeking an opinion of the Ethics Board. However, by agreement or custom or understanding, a town may authorize its attorney to request advice from the Ethics Board on behalf of an individual town employee or town board member.

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actions upon such requests shall be in meetings not open to the public. It is prima facie evidence of intent to comply with this subchapter or subch. III of ch. 13 when a person refers a matter to the board and abides by the board's advisory opinion, if the material facts are as stated in the opinion request. The board may authorize the executive director to act in its stead in instances where delay is of substantial inconvenience or detriment to the requesting party. No member or employee of the board may make public the identity of the individual requesting an advisory opinion or of individuals or organizations mentioned in the opinion.

<sup>5</sup> Section 19.55 (2) (a), *Wisconsin Statutes*, provides:

**(2)** The following records in the board's possession are not open for public inspection:

(a) Records obtained in connection with a request for an advisory opinion other than summaries of advisory opinions that do not disclose the identity of individuals requesting such opinions or organizations on whose behalf they are requested. The board may however, make such records public with the consent of the individual requesting the advisory opinion or the organization or governmental body on whose behalf it is requested. A person who makes or purports to make public the substance of or any portion of an advisory opinion requested by or on behalf of the person is deemed to have waived the confidentiality of the request for an advisory opinion and of any records obtained or prepared by the board in connection with the request for an advisory opinion.

¶9 The town chair wrote to you seeking your advice. How or whether you answered him, we do not know. Your written opinion to him, if there was one, may be made public only by him (§19.59 (1) (b), *Wisconsin Statutes*).

¶10 You are in the best position to know on whose behalf you sought the Board's advice. Based on the facts you have provided, it appears to us likely that you acted on behalf of the town board when you requested the Ethics Board's opinion. If so, then you may and should provide our opinion to the Town Board. However, this is a question of fact we cannot resolve for you.

#### Advice

¶11 The person or persons on whose behalf you sought the Ethics Board's advice are entitled to keep the Board's opinion confidential. Whether you directed your letter to the Ethics Board on half of the Town, or on behalf of the Town's chair, is a question of fact we cannot resolve for you.

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